1959

*Jun. 9, 10
**Nov. 2

CLAUDE PERRAS (*Defendant*) .....APPELLANT;

AND

GEORGES HENRI BOULET AND EDGAR LUDGER BOULET (*Plaintiffs*) ..... RESPONDENTS;

AND

THE CALLWAY SASH & DOOR INCORPORATED ..... DEBTOR.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Bankruptcy—Trustee under proposal—Remuneration—Subsequent bankruptcy of debtor—New trustee appointed—Whether claim of former trustee under proposal privileged—The Bankruptcy Act, R.S.C. 1952, c. 14, Part III, ss. 34, 38, 95.

The plaintiffs, who were licensed trustees under the *Bankruptcy Act*, acted as trustees under two proposals made under Part III of the Act as approved by the debtor's creditors and the Court. The debtor was subsequently declared bankrupt and the defendant appointed trustee. The trial Court declared the plaintiffs entitled as their fee to $6,952.91 but to rank only as ordinary creditors. This judgment was varied by the Court of Appeal to the extent of declaring the plaintiffs to be entitled to be collocated and paid by preference the sum of $4,003.41 and to rank as ordinary creditors for the balance. In this Court it was agreed that the $4,003.41 represented the value of the services rendered under the proposals, and the sole question was as to whether it should be paid by preference.

Held: The appeal should be dismissed.

The fees and expenses of the plaintiffs, amounting to $4,003.41, came within the costs of administration contemplated in s. 95(1)(*b*) of the *Bankruptcy Act*, and therefore, the plaintiffs were entitled to be collocated and paid that sum by preference out of the proceeds realized from the property of the debtor. These costs were clearly incurred for the common interest of the creditors.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], modifying a judgment of Montpetit J., sitting in bankruptcy. Appeal dismissed.

J. P. Bergeron, Q.C., and *B. M. Deschenes*, for the defendant, appellant.

*PRESENT: Taschereau, Locke, Fauteux, Abbott and Martland JJ.
**Locke J., owing to illness, took no part in the judgment.

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J. Turgeon, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal by leave, from a judgment of the Court of Queen's Bench[1], modifying a judgment of the Superior Court for the district of Montreal, sitting in bankruptcy, dated June 5, 1956, declaring the respondents entitled to a claim against the estate of the debtor in the amount of $6,615.41, and holding that, of the said amount, respondents are entitled to be collocated and paid by preference the sum of $4,003.41.

The facts, which are not now in dispute, are briefly as follows:— On January 21, 1954, the debtor, The Callway Sash & Door Inc. lodged with respondents, who are licensed trustees under the *Bankruptcy Act,* a proposal for an extension of time, in accordance with the provisions of Part III of the *Bankruptcy Act,* R.S.C. 1952, c. 14. Under this proposal, the respondents were to act as trustees with full power to control the operations of the debtor company, the clauses in the proposal to this effect reading as follows:

a) Messieurs Georges-Henri Boulet, C.A., et Edgar-Ludger Boulet, C.A., de la firme Boulet & Boulet, C.A., tous deux syndics licenciés, 115, rue St-Pierre, Québec seront les syndics nommés pour contrôler les opérations de la débitrice;

b) Les contrôleurs auront pleins pouvoirs pour contresigner les chèques, contrôler et approuver les recettes et déboursés, les contrats, la tenue des livres, les salaires ainsi que tous les revenus et dépenses de la débitrice; le dit mandat pourra être exécuté par l'un ou l'autre des syndics aussi bien que par un membre de leur personnel sous leur directive.

The proposal was assented to by the creditors and approved by Superior Court for the district of Quebec, sitting in bankruptcy, on March 10, 1954, as required by s. 34 of the Act.

A subsequent proposal modifying the terms of payment, but containing identical provisions as to the duties and responsibilities of respondents, was submitted by the debtor on November 8, 1954, assented to by the creditors, and approved by the Court.

In December 1954, the debtor made the first payment called for under the amended proposal. There is no evidence that the debtor was ever in default under the terms

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of this proposal; it was never annulled under the provisions of the Act, nor was any request made for such annulment. However it would appear that the financial position of the company deteriorated and on June 6, 1955, a receiving order was made against it by the Superior Court for the district of Montreal, sitting in bankruptcy, and in due course appellant was appointed trustee. Respondents thereupon filed with appellant claims for fees and expenses as trustees under the proposal, but these claims were disallowed.

On appeal to the bankruptcy Court for the district of Montreal, that Court declared respondents entitled to amounts totalling $6,952.91 but to rank for that amount only as ordinary creditors. As I have stated, on appeal by respondents to the Court of Queen's Bench, the judgment of the trial Court was modified and respondents declared entitled to be collocated and paid by preference the sum of $4,003.41 and to rank as ordinary creditors for the balance of their claims.

Various questions as to the portion of the respondents' claims representing ordinary accounting services, as distinct from their services as trustees under the proposal, were discussed in the Courts below, but these are no longer in issue. Before this Court, it was agreed that the sum of $4,003.41 represents the value of the services rendered by respondents as trustees under the proposal prior to the making of the receiving order. The sole question to be determined here, therefore, is whether or not, in the distribution of the assets of the debtor, respondents are entitled to be collocated and paid the said sum by preference.

The *Bankruptcy Act*, R.S.C. 1927, c. 11, as amended was repealed in 1949, the present Act (enacted at the same session of Parliament) came into force on July 1, 1950, and in the new Act the provisions of the former Act dealing with proposals were extensively revised. During the period from October 1, 1923 (the date of the coming into force of the amendments of that year) to July 1, 1950, a proposal for a composition, extension or scheme of arrangement might only be submitted after the making of a receiving order or authorized assignment, and the appointment of a trustee. Under the provisions of Part III of the present Act (which Part deals entirely with proposals), a proposal may

now be made by an insolvent debtor before a receiving order or authorized assignment has been made, or by a bankrupt after the making of such receiving order or authorized assignment.

Proceedings for a proposal are commenced in the case of an insolvent person by lodging with a licensed trustee—or in the case of a bankrupt, with the trustee of the estate—the proposal and supporting documents, (s. 27(2)).

Before becoming effective, a proposal must be accepted by the creditors and approved by the Court, and the conditions upon which such approval may be given by the Court, are set out in s. 34, which reads as follows:

34. (1) The court shall, before approving the proposal, hear a report of the trustees in the prescribed form as to the terms thereof and as to the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 156 to 158.

(3) Where any of the facts mentioned in sections 130 and 134 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents in the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

(4) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor, and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy, nor shall any proposal be approved in which any other person is substituted for the trustee to collect and distribute to the creditors any moneys payable under the proposal.

(5) In any other case the court may either approve or refuse to approve the proposal.

(6) The approval by the court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide.

(7) No costs incurred by a debtor on or incidental to an application to approve a proposal other than the costs incurred by the trustee shall be allowed out of the estate if the court refuses to approve the proposal.

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The provisions contained in Part III, relating to proposals, form part of an enactment which—to adopt the words used by Lord Herchell in the *Voluntary Assignments Case*[1] is "designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not". Moreover, the last section in Part III, 38(1) reads as follows:

38. (1) All the provisions of this Act, in so far as they are applicable, apply *mutatis mutandis* to proposals.

Sections 95 *et seq.* provide for the manner in which the proceeds realized from the property of a bankrupt shall be distributed, and, as I have said, the question here, is whether the sum of $4,003.41, admitted to be the value of the services rendered by respondents as trustees under the proposal, should be collocated and paid by preference as part of the costs of administration, as that term is used in s. 95(1)(*b*), which reads as follows:

95. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

* * *

(*b*) the costs of administration, in the following order,

(i) the expenses and fees of the trustee

(ii) legal costs.

In my opinion, these costs were clearly incurred for the common interest of the creditors. Under the terms of the proposal—as required by s. 34(4)—such costs were to be paid in priority to other claims and the proposal was accepted by the creditors and approved by the Court. These costs were part of the costs of administering the property of an insolvent person by licensed trustees, authorized to do so under the provisions of the Act. Reading the Act as a whole, and in particular in view of the provision contained in s. 38(1), which I have quoted, I share the opinion expressed in the Court below that the fees and expenses of the respondents, amounting to $4,003.41, come within the costs of administration contemplated in s. 95(1)(*b*), and

[1] [1894] A.C. 189 at 200. *The Attorney-General of Ontario v. the Attorney General for the Dominion of Canada.*

that respondents are entitled to be collocated and paid the said amount by preference out of the proceeds realized from the property of the debtor.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorney for the defendant, appellant: B. M. Deschenes, Montreal.

Attorneys for the plaintiffs, respondents: Lesage, Turgeon & Bienvenue, Quebec.